Karanja v Chege (Civil Appeal E065 of 2022)
[2024] KEHC 15576 (KLR) (Civ) (5 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15576 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E065 OF 2022

CW MEOLI, J

DECEMBER 5, 2024

BETWEEN

PENINAH NYAKIO KARANJA ..... APPELLANT

AND

SIMON WAIHARO CHEGE ..... RESPONDENT

RULING

1. The Notice of Motion dated 22.04.2024 has been brought by Peninah Nyakio Karanja (hereafter the Applicant) seeking to set aside the dismissal order of 30.06.2023 and the reinstatement of the appeal for hearing and determination; and further, an order staying execution of the judgment delivered by the trial court on 31.01.2022 in Milimani CMCC No. 5601 of 2019 pending the hearing and determination of the appeal.

2. The Motion is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 12, Rule 7 of the Civil Procedure Rules (CPR); and Articles 50 and 159(2)(d) of *the Constitution* of Kenya, 2010. The Motion is further premised on the grounds featured on its face and amplified in the supporting affidavit sworn by the Applicant, stating that the trial court had by its impugned judgment dismissed her suit whilst simultaneously allowing the counterclaim filed by Simon Waiharo Chege (hereafter the Respondent) in the sum of Kshs. 100,000/-. The Applicant stated that being aggrieved with the decision, she instructed her erstwhile advocates to lodge an appeal via the memorandum of appeal dated 14.02.2022.

3. The deponent further swore that vide a letter dated 14.02.2022, she applied for certified copies of the judgment and typed proceedings from the lower court, to enable her compile a record of appeal, but that the same were supplied; that unfortunately, the erstwhile advocates did not pursue the appeal thereafter, resulting in issuance of a notice to show cause (NTSC) requiring her to demonstrate why the appeal should not be dismissed for want of prosecution; and that in the absence of any cause being

shown, the appeal was consequently dismissed. She deposes that she only came to learn of the dismissal order upon being served with a notice to show cause as to why she should not be committed to civil jail in execution of the lower court decree.

4. The Applicant asserted that she wishes to prosecute her appeal to its logical conclusion, hence the instant Motion. The Applicant further undertook to file and serve the record of appeal within seven (7) days of the appeal being reinstated, adding that she is willing to comply with the conditions that may be set by this court.

5. In response to the Motion, the Respondent swore a replying affidavit on 7.10.2024, terming the Motion a blatant abuse of the court process for the following reasons. That the said Motion is a mere attempt at denying him the fruits of his judgment and further frustrating the execution process; that since filing the appeal, the Applicant has not taken or at the very least shown any active steps taken in prosecuting it or in following up on the relevant proceedings; that the Applicant is ultimately guilty of laches and is therefore undeserving of the exercise of this court's discretion in her favour; and that the Motion having been brought too late in the day. The Respondent further averred that the legal threshold for reinstatement of the appeal and for granting a stay of execution has not been met by the Applicant herein. For those reasons, the court was urged to dismiss the Motion, with costs.

6. At the hearing thereof, it was agreed by counsel for the respective parties that the Motion be determined on the basis of the affidavit material filed.

7. The court has therefore considered the rival affidavit material. The grant or refusal to set aside or vary an order, judgment or any consequential decree or order, is discretionary, wide, and unfettered. However, the discretion must be exercised judicially and justly. The rationale for the discretion to set aside as conferred on the court was spelt out in the case of Shah v Mbogo and another [1967] E.A 116:

> " The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

8. The Applicant approached the court inter alia, under Order 12, Rule 7 (on the setting aside of a judgment or dismissal order made on non-attendance by a party or parties) of the CPR. The Applicant further cited Sections 1A, 1B (on the overriding objective of the Act) and 3A (on the inherent powers of the court) of the CPA; and Articles 50 (on the right to a fair hearing) and 159(2)(d) (on the principle that justice shall be administered without undue regard to procedural technicalities) of *the Constitution* of Kenya, 2010.

9. The appeal was dismissed following a NTSC, hence the applicable provision here would be Section 3A of the CPA, which reserves the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court." The Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR stated thus:

> " Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that
>
> "Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court

implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

10. The Supreme Court went further in Board of Governors, Moi High School Kabarak and another v Malcolm Bell [2013] eKLR, to add the following:

> " Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)

11. A perusal of the record herein reveals the events leading to the instant Motion to be as follows. The Applicant filed her memorandum of appeal on 15.02.2022. No further progressive steps took place in the appeal, thereby resulting in issuance of NTSC on 17.05.2023 requiring the parties to show cause why the appeal should not be dismissed for want of prosecution. An affidavit of service sworn by process server Jackson Kanyoro on 23.05.2023demonstrates due service of the NTSC upon the respective parties through their advocates. At the hearing of the NTSC on 30.06.2023, none of the parties were in attendance. Accordingly, Ongeri, J. proceeded to dismiss the appeal, under Order 42, Rule 35(2) of the CPR. This order was followed by execution of the lower court decree, prompting the instant Motion close to 10 months later.

12. The court has considered the explanations given by the Applicant to the effect that the delay in prosecuting the appeal was primarily caused by lack of certified copies of the judgment and inadvertence on the part of her erstwhile advocates in pursuing the appeal. The record shows that while the Deputy Registrar of this court sent reminders dated 16.02.2022; 17.03.2022 and 21.04.2022 to the Chief Magistrate, Milimani Commercial Courts, requesting for the lower court record, the Applicant on her part only availed one (1) correspondence dated 14.02.2022 as annexed to her supporting affidavit and marked as annexture "PNK-1". Being a letter addressed to the Executive Officer, Chief Magistrate's Court, Milimani Commercial Courts by her erstwhile advocates, applying for proceedings.

13. Save for the said correspondence, no other material was tendered before the court to demonstrate diligent and persistent attempts by the Applicant at following up on the said documents, or to indicate any difficulties experienced in that regard. The court is not convinced that one (1) letter by or on behalf of the Applicant would suffice as a reasonable effort at pursuing the records with the aim of progressing the appeal.

14. Furthermore concerning the alleged inadvertence on the part of the Applicant's erstwhile advocates as purported in her affidavit and grounds to the Motion, the court while acknowledges the legal principle that the mistake of an advocate should not be visited upon the client as a matter of general principle, does not accept that this principle does applies in a blanket sense. It is trite law that a suit/appeal ultimately belongs to the litigant and not the advocate, hence it is the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim.

15. The above position was spelt out by the Court of Appeal in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR when it held that:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized

that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

16. Moreover, the Court of Appeal stated in the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR that:

> " While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

17. In the present instance, no credible material was tendered to demonstrate any attempts made by the Applicant herself at following up on the progress of the appeal with the erstwhile advocates or prompting them to timeously prosecute the appeal since its inception, at any point in time. The appeal had lain dormant for a period of over one (1) since it was instituted and the dismissal. Additionally, there was an inordinate delay of close to one (1) year between the date of issuance of the dismissal order and the filing of the instant Motion.

18. Indeed, the Respondent's assertions that the Applicant has been prompted to action by ensuing execution do not appear farfetched. Thus, the Applicant evidently went into slumber for three years after filing her appeal and has only been woken up by the execution process. Such a litigant cannot expect the court to exercise its discretion in her favour and to the detriment of the Respondent who has an unsatisfied decree and therefore lawfully entitled to enjoy the fruits of his judgment. He will likely suffer prejudice if the orders sought are granted. Certainly, litigation must come to an end. The court rejects the prayer seeking to reinstate the appeal and will therefore not address the remaining prayer seeking to stay of execution.

19. Consequently, the Notice of Motion dated April 22, 2024 is without merit and is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2024.

C. MEOLI

JUDGE

In the presence of

For the Applicant: Ms Kiarie h/b for Mr. Sore

For the Respondent: Mr. Kangethe

C/A: Erick